Supreme Court, U. S.
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Docket No. 79-1980

IN THE

Supreme Court of the United States

GERALD E. THOMAS d/b/a J & J EXXON; JERRY LUKE d/b/a K & L MOBILE SIGNS, INC.; BUDDY COBB d/b/a AAA MOBILE ADS AND SIGNS, INC.; KENNETH HAMMOCK d/b/a A MOBILE SIGN CO.; ROBERT B. WILLIAMS d/b/a WILLIAMS AUTO SALES AND LEASING, INC.; and C. B. MITCHELL d/b/a MITCH'S SIGNS

v.

THE CITY OF MARIETTA, GEORGIA; and MAYOR AND COUNCIL OF THE CITY OF MARIETTA, GEORGIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

RESPONDENTS' BRIEF IN OPPOSITION

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The Mayor and Council of the City of Marietta, Georgia, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the Supreme Court of Georgia in this case. That opinion is reported as case no. 35879.

TABLE OF CONTENTS

Table of Authorities 4

Question Presented for Review 6

Statement of the Case 5

Reasons for Denying the Writ

I. THE ACTS OF A MUNICIPALITY SHOULD NOT BE DISTURBED UNLESS THEY ARE CLEARLY ARBITRARY AND UNREASONABLE 7

II. THE ZONING ORDINANCE ADOPTED BY THE MAYOR AND COUNCIL OF THE CITY OF MARIETTA DOES NOT ABRIDGE PETITIONERS' RIGHT TO FREEDOM OF SPEECH 10

Conclusion 12

Appendix A 14

Appendix B 15

TABLE OF AUTHORITIES

CASES

E. B. Elliott Advertising Company v. Metropolitan Dade County, 425 F. 2d 1141 (5th Cir. 1970) 8

Gorieb v. Fox, 274 U.S. 603 (1927) 9

City of Smyrna v. Parks, 240 Ga. 699, 242 SE2d 73 (1978) 9

Daugherty v. City of East Point, 447 F.Supp. 290 (1978) 10

Linmark Assoc. v. Township of Willingboro, 431 U.S. 85 (1977) 10

Murdock v.Pennsylvania, 319 U.S. 105 (1943) 11

Jamison v. Texas, 318 U.S. 413 (1943) 11

State of Hawaii v. Diamond Motors, Inc., 50 H 33, 429 P. 2d 825 (1967) 11

UNITED STATES CONSTITUTION

Article I, Section 10, Clause 1 5

First Amendment 5

Fifth Amendment 5

Fourteenth Amendment 5

STATUTES

Georgia Code §69-1207 5

Marietta Sign Ordinance 3315 15

STATEMENT OF THE CASE

Municipal corporations in Georgia have been delegated the power to regulate land use within their boundaries for the purpose of promoting the health, safety, morals, convenience, order, prosperity, and general welfare of their residents. Ga. Code §69-1207.

Based on Ga. Code §69-1207, the Mayor and Council of the City of Marietta passed several ordinances which regulate the display of portable signs. The particular statute under consideration is sign ordinance 3478 which regulates the use of portable display signs. Petitioners contend that this ordinance is unconstitutional as violative of Article 1, Section 10, paragraph 1 of the Constitution of the United States, Amendment One, Amendment Five, and Amendment Fourteen.

The Supreme Court of Georgia did not reach the Constitutional claims enumerated above. In that Court's decision of this case, it was held that "municipalities may validly regulate the election and maintenance of signs. The validity of a particular sign ordinance, however, depends on the reasonableness of its purpose, operation and effect." Referring to the ordinance under consideration, the Court stated, "This ordinance, however, is clearly reasonably meant to regulate signs which are, in their very nature, temporary. The regulations are designed to prevent the use of these temporary signs where a permanent one would be more conducive to the safety and welfare of the public. We do not find these ordinances arbitrary or discriminatory." Respondent contends that the Supreme Court of Georgia was correct in upholding the validity of the ordinance.

QUESTION PRESENTED

Was the Supreme Court of Georgia correct in holding that a municipality may validly regulate the erection and maintenance of signs?

REASONS FOR DENYING THE WRIT

I. THE ACTS OF A MUNICIPALITY SHOULD NOT BE DISTURBED UNLESS THEY ARE CLEARLY ARBITRARY AND UNREASONABLE.

Petitioners erroneously contend that the Marietta sign ordinance is an arbitrary law designed solely to eliminate the portable display sign industry. Their first argument is that the City of Marietta has adopted a statute in which there is a "reasonable sounding purpose in the introductory language," but that the true purpose of the ordinance is that "individual council members just plain do not like the signs and are trying to regulate them . . . out of business."

The question to be decided here is whether the Marietta sign ordinance is an unreasonable and arbitrary exercise of municipal authority. Respondent contends that it is not.

> The stated purpose of the sign ordinance is as follows: "PURPOSE: The purpose of this ordinance is to provide standards to safeguard life, public health, property and welfare by regulating the location, size, illumination, erection, maintenance, and quality of materials of all signs, and all signs and outdoor advertising structures."

The authority to pass such zoning legislation by various municipalities in Georgia is conferred by Ga. Code §69-1207, which reads:

> "For the purpose of promoting the health, safety, morals, convenience, order, prosperity, or general welfare of the municipality or county or both, the governing authorities of the municipality and county, respectively, are hereby impowered, the municipality within the corporate limits thereof, and the county within the unincorporated areas thereof, in accordance with the conditions and the procedure specified in this Chapter, to regulate the location, height, bulk, number of stories and size of buildings and other structures, the percentage of lot which may be occupied, the sizes of yards, courts, and other open spaces, the density and distribution of populations, and the uses of buildings, structures, and land for trade, industry, residence,

recreation, agriculture, forestry, conservation, water supply, sanitation, protection against floods, public activities, and other purposes. Such regulations shall be made in accordance with a comprehensive plan and shall be designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses, and with a view to promoting desirable living conditions and the sustained stability of neighborhoods, protecting property against blight and depreciation, securing economy in governmental expenditures, conserving the value of buildings and encouraging the most appropriate use of land and other buildings and structures throughout such muncipality or county or both."

The Marietta sign ordinance is designed to accomplish two ends: to promote traffic safety on the streets of the city, and to improve the beauty of the land surrounding these streets, thus to maintain and increase the attractiveness of the area to tourists and residents alike, and thus influence the economic prosperity of the city. In *E. B. Elliott Advertising Co. v. Metropolitan Dade County,* 425 F.2d 1141 (5th Cir. 1970), the Fifth Circuit Court of Appeals ruled that a Dade County, Florida, ordinance which prohibited commercial advertising signs within 200 feet of any expressway right-of-way did not violate the Due Process Clause of the Fourteenth Amendment and did not require notice and an opportunity for hearing before enforcement. In *E. B. Elliott, supra,* the court commented on the reasonableness of the Dade County sign ordinance:

"The essential purpose of an advertising sign placed adjacent to a highway is to attract the attention of the motoring public long enough to convey a commercial message. Conceding that the message presented by an average sign can be comprehended by a motorist of average

> intelligence in an insignificant amount of time, and that eye movement improves the alertness of an expressway driver, the speed and density of modern traffic, coupled with the braking limitations of the modern automobile, can conceivably make even the most insignificant amount of time during which a driver's attention is diverted a matter of direst consequences. It is also clear that the prohibition of outdoor advertising signs within 200 feet of an expressway bears a reasonable relationship to basic aesthetic considerations. Granting that 'beauty is to the eye of the beholder,' it cannot be denied that outdoor advertising signs tend to interrupt what would otherwise be the 'natural landscape' as seen from the highway, something that is apparently more and more felt that the American public has a right to see unhindered by billboards, whether the view is untouched or ravished by man." *E. B. Elliott, supra at 1152.*

The arguments advanced by the court in the *E. B. Elliott* case to support the reasonableness of the Dade County sign ordinance should apply with equal force to the Marietta sign ordinance.

The arguments that the Marietta sign ordinances are designed to promote safety and aesthetic beauty are clearly *not* unreasonable. In *Gorieb v. Fox,* 274 U.S. 603 (1927), it was held that, "The acts of the governing body of a county (or municipality) exercising zoning power will not be disturbed by the courts unless they are clearly arbitrary and unreasonable. Justice Sutherland, referring to zoning ordinances, stated, 'State legislatures and city councils, who deal with the situations from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.' "

The City of Marietta relied in the Georgia courts upon the case *City of Smyrna v. Parks,* 240 Ga. 699. That case involved a city zoning ordinance which prohibited chain link fences from being places in residential front yards. It is not necessary that respondent now rely solely on this precedent. However, much of the reasoning, and many of the precedential cases which were used in that case are applicable here and have been utilized above.

Thus, although *City of Smyrna* can be distinguished from the case sub judice, *City of Smyrna* does provide valuable assistance in deciding the issues of this case.

II. THE ZONING ORDINANCE ADOPTED BY THE MAYOR AND COUNCIL OF THE CITY OF MARIETTA DOES NOT ABRIDGE PETITIONER' RIGHT TO FREEDOM OF SPEECH.

Petitioners cite the cases of *Daugherty v. City of East Point*, 447 F. Supp. 290 (1978), and *Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85, 52 L.Ed. 2d 155, 97 S.Ct. 1614 (1977), for the proposition that commercial speech cannot be banned because of the unsubstantiated belief that its impact is detrimental. Both cases held that municipalities may not achieve important racial policy objectives by restricting the free flow of truthful commercial information, such as the posting of "for sale" and "sold" signs in residential neighborhoods. It is submitted here that the Marietta sign ordinance does not in any way restrict the *content* of the message placed on portable signs that are the subject of these regulations. If that were the case here, then the *Daugherty* and *Linmark* decisions would be applicable; but otherwise they are not.

In the reasoning of both opinions, the courts conceded that "there is no question that reasonable time, place, and manner of regulations may be necessary to further significant governmental interest and are permitted." *Daugherty, supra* at 295. Commercial speech is not entitled to the same First Amendment protections that individual speech is accorded, *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870; *Jamison v. Texas,* 318 U.S. 413, 63 S.Ct. 69. It is submitted here that the Marietta sign ordinance does not violate petitioners' First Amendment rights to freedom of speech. A complaining businessman made a similar argument in challenging the validity of a Honolulu, Hawaii, sign ordinance; and the Supreme Court of Hawaii ruled that a limitation by ordinance of the size and height of outdoor signs in an industrial district is not a denial of free speech. *State of Hawaii v. Diamond Motors, Inc.,* 429 P.2d 825 (1967).

Respectfully submitted,

BARNES AND BROWNING, P.C.

By: Roy L. Barnes

ROY L. BARNES
Attorney for Respondent

CONCLUSION

For reasons herein specified, it is requested that the petition for certiorari be denied.

APPENDICES'

"A" AND "B"

APPENDIX A

Georgia Code 69-1207 Zoning; grant of power

For the purpose of promoting the health, safety, morals, convenience, order, prosperity, or general welfare of the municipality or county or both, the governing authorities of the municipality and county, respectively, are hereby impowered, the municipality within the corporate limits thereof, and the county within the unincorporated areas thereof, in accordance with the conditions and the procedure specified in this Chapter, to regulate the location, height, bulk, number of stories and size of buildings and other structures, the percentage of lot which may be occupied, the sizes of yards, courts, and other open spaces, the density and distribution of populations, and the uses of buildings, structures, and land for trade, industry, residence, recreation, agriculture, forestry, conservation, water supply, sanitation, protection against floods, public activities, and other purposes. Such regulations shall be made in accordance with a comprehensive plan and shall be designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses, and with a view to promoting desirable living conditions and the sustained stability of neighborhoods, protecting property against blight and depreciation, securing economy in governmental expenditures, conserving the value of buildings and encouraging the most appropriate use of land and other buildings and structures throughout such municipality or county or both.

(Acts 1957, pp. 420, 425; 1969, pp. 735, 736.)

APPENDIX B

The City of Marietta adopted a comprehensive sign ordinance No. 3315, August 10, 1977:

"Purpose. The purpose of this ordinance is to provide standards to safeguard life, public health, property and welfare by regulating the *location, size, illumination, erection,* maintenance and quality of materials of all signs and all signs and outdoor advertising structures."

On March 14, 1979, the Marietta City Council enacted Ordinance No. 3478 (Council Bill No. 114479), which amended the comprehensive ordinance No. 3315, specifically concerning portable signs. Ordinance 3478, defines portable display signs as follows:

"*Portable Display Sign:* A mobile/temporary electrical or non-electrical sign that is mounted on a trailer type frame with wheels or skids or portable wood or metal frame and not permanently attached to the ground".

The amendment further provided:

"9. Portable display signs are to be permitted only in the following conditions:

a. Opening or a closing of a business, not to exceed thirty (30) days.
b. Special sale, promotional event, or change of ownership or management, not to exceed twice in any twelve (12) month period, for a mixiumum of fifteen (15) days.
c. Civic, public, charitable, educational or religious events for a maximum of fifteen (15) days, not to exceed twice in any twelve (12) month period.
d. For traffic direction during road construction or emergency situations.
e. For political campaigns, for a maximum of thirty (30) days before any election."

Portable signs erected in violation of Ordinance 3315 are given notice under the following provision:

"*Notice of Violation:* If any sign is erected or maintained in violation of any of the provisions of this ordinance, the City

of Marietta shall have the power to give the owner thereof written notice of such violation. Said notice to include a brief statement of the particulars in which this article is violated and the manner in which such violation is to be remedied. If the sign has been registered with the City of Marietta, notice to the registered owner or the person or firm receiving the permit shall be sufficient. If the sign has not been registered and the owner is not known, the affixing of a copy of the notice to the sign, sign structure, or building for a period of ten (10) days shall be sufficient. If a sign owner cannot be found, the duty to perform corrections or removal of the sign will be upon the property owner on whose property the sign is attached.

a. If such violation is not remedied within thirty (30) days after such violation, the owner shall remove the sign immediately.

b. If the sign is not removed by the owner, the City of Marietta shall have the right to remove such sign at the expense of the owner thereof. The cost of removing the sign shall not be less than twenty-five ($25.00) dollars.

c. If the sign is not removed or corrected after proper notice, a twenty-five ($25.00) dollar fine for each day of continued violation will be imposed by the municipal court."